STATE OF MICHIGAN

IN THE SUPREME COURT

ABDUL AL-SHIMMARI,

Plaintiff-Appellee,

vs.

SETT S. RENGACHARY, M.D., THE DETROIT MEDICAL CENTER, HARPER-HUTZEL HOSPITAL, and UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C.,

Defendants-Appellants.

_____/

Supreme Court No. _____

Court of Appeals No. 262655

Lower Court No. 04-407162-NH

130078

PLAINTIFF-APPELLEE'S RESPONSE TO DEFENDANTS-APPELLANTS' APPLICATION FOR LEAVE TO APPEAL

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COUNTER-STATEMENT OF JURISDICTION

(1) The Michigan Supreme Court has jurisdiction to review by appeal a decision of the Court of Appeals under MCR 7.302(A)(2), based on the following information.

(2) Defendants-Appellants seek leave to appeal the Court of Appeals' Opinion, which was rendered on November 1, 2005, reversing both, the Wayne County Circuit Court's Order dated October 22, 2004, which granted Defendant-Appellant's, Setti S. Rengachary, M.D., Motion for Summary Disposition pursuant to MCR 2.116(C)(7), and the Wayne County Circuit Court's final Order dated April 20, 2005, which granted Defendants-Appellants', The Detroit Medical Center, Harper-Hutzel Hospital, and University Neurosurgical Associates, P.C., Motion for Summary Disposition With Prejudice, pursuant to MCR 2.116(C)(7).

(3) A Notice of Hearing has been set for Tuesday, January 10, 2005, by Defendants-Appellants', on their Application for Leave.

(4) Plaintiff-Appellee is submitting this Opposing Brief to Defendants-Appellants' Application for Leave, pursuant to MCR 7.302(D)(1).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. SHOULD THIS COURT DECLINE DEFENDANTS-APPELLANTS' REQUEST TO REVIEW THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT WHEN THERE IS A DISPUTED QUESTION OF FACT AS TO WHETHER DEFENDANT-APPELLANT HAD BEEN SERVED WITH PROCESS PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS, AND DEFENDANT'S MOTION FOR SUMMARY DISPOSITION HAS BEEN FILED AND GRANTED PURSUANT TO MCR 2.116(C)(7), AND A JURY TRIAL HAS BEEN TIMELY DEMANDED BY PLAINTIFF, THE ISSUE OF SERVICE OF PROCESS MUST BE SUBMITTED TO THE JUSRY.

Plaintiff/Appellee: **YES**

Defendants/Appellants: **NO**

II. SHOULD THIS COURT DECLINE DEFENDANTS-APPELLANTS' REQUEST TO REVIEW THE QUESTION OF WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT A PRINCIPAL CAN BE HELD VICARIOUSLY LIABLE FOR THE NEGLIGENCE OF ITS AGENT, WHEN AN AGENT HAS ESCAPED LIABILITY BY VIRTUE OF THE STATUTE OF LIMITATIONS.

Plaintiff/Appellee: **YES**

Defendants/Appellants: **NO**

COUNTER-STATEMENT OF MATERIAL FACTS AND PROCEEDINGS

INTRODUCTION

Appellee, Plaintiff below, Abdul Al-Shimmari ("Appellee"), is an Iraqi refugee, who came to the United States in 1993. During the Iraq-Iran War, Appellee was confined to a prison for seven years, where he suffered severe physical torture, including, but not limited to electrical shock. After his release, Appellee was forced to join the Saddam Hussein Army, but attempted to escape. Again, Appellee was caught and confined to a prison for another seven months. Appellee was finally released after the Persian Gulf War in 1991. After coming to the United States, Appellee began working for an Arizona company named, Nelco Technology, Inc. in 1999. While employed at Nelco Technology, Inc., Appellee injured his back. Since that incident, Appellee has been plagued with continuing chronic back pain.

Additionally, Appellee was diagnosed in November 2000, and again in April 2002, with chronic post-traumatic stress disorder and major depressive disorder, recurrent with psychotic features.

The underlying cause of action is a medical malpractice case premised on the negligence of Defendant-Appellant Setti S. Rengachary, M.D., who, after just one face-to-face visit with Appellee, without ordering the appropriate diagnostic studies and psychiatric evaluations, and for the very first time by the very first health professional, in contradiction of over two years of medical opinion, treatment, and care, by numerous health professionals, including but not limited to specialists in lumbar spinal diseases, Dr. Rengachary, proposed major and extensive surgery consisting of a lumbar laminectomy, disectomy, fusion and pedicle screw stabilization at L4-L5!

Appellants, Harper-Hutzel Hospital, The Detroit Medical Center, and University Neurosurgical Associates, P.C., are named Defendants in the underlying cause of action, based

on the doctrine of respondeat superior (There are also direct claims of negligence against Harper-Hutzel Hospital and The Detroit Medical Center).

Due to Dr. Rengachary's negligent decision to perform surgery on Appellee and due to Dr. Rengachary's negligent performance of that surgery, Appellee is permanently disabled.

As a result of Dr. Rengachary's negligence, Appellee is currently suffering from an aggravation and/or accentuation of pre-existing depression and/or psychosis; Appellee has suffered nerve injury in the distribution of the right L3-L4-L5 myotomes; Appellee is suffering from unrelenting pain, now requiring the use of OxyContin, which has resulted in narcotic addiction; and Appellee is suffering from a total and permanent disability. He brought this medical negligence action to recover damages from his injuries, alleging that the surgical procedure was not medically warranted, he has suffered permanent injuries as a result of the surgical procedure done negligently, and the effects this has had on him personally, medically, professionally, and socially.

On or about April 15, 2004, Appellant, Defendant below, Dr. Rengachary, filed motions for summary disposition, all premised on the same set of facts: that Appellant was not served in person or by mail, and was only made aware of the underlying proceedings from a colleague, conveniently, after the Statute of Limitations had allegedly expired. **(Defenant's Motion for Summary Disposition under MCR 2.116(C)(2), (3), and (8) to Dismiss Setti S. Rengachary, M.D. for Lack of Proper Process and Service within the Statute of Limitations; Setti Rengachary, M.D.'s Motion for Summary Disposition In Lieu of an Answer Pursuant to MCR 2.116(C)(7) and (8) filed with the Trial Court).** In fact, Appellant, Dr. Rengachary, emphasizes in bold, "Plaintiff never attempted to serve Dr. Rengachary in person or by mail." He further emphasizes in bold, "Dr. Rengachary was never personally served, nor did Plaintiff

send the Summons and a copy of the Complaint by registered or certified mail to him." **(Defendant's Motion for Summary Disposition, pgs. 2-3).**

To further support his position on the alleged service of process issue, although it is found in a subsequent pleading titled Defendants' Motion to Set Aside Entry of Default, Objection to Plaintiff's Notice of Entry of Default Against All Defendants and For Costs of $3,500.00 Against Andre M. Sokolowski and Michael S. Daoudi for an Improper and Malicious Filing and Proof of Service, through Scott A. Saurbier, Esq., Appellant, Dr. Rengachary, states **he was never personally served**, and found out about the instant proceeding through a colleague of his, conveniently, a day after the alleged Statute of Limitations had expired. **(Defendants' Motion to Set Aside Entry of Default, pg. 3)**

It is an appropriate time to state that the returns of service, which state under oath, by Ms. Lois Wincel, a disinterested third party, that Appellant had been personally served on March 11, 2004, were on file with the Trial Court since April 12, 2004. (Returns of Service)

Over a month after the filing of the motions for summary disposition and a day before the hearing date, which was set by the Defendants for Friday, May 14, 2004, Appellee's Counsel receive an affidavit by Appellant, Dr. Rengachary, which is in complete contradiction to what the motions are even premised on! In short, the affidavit states that Appellant was personally served, again conveniently a day after the alleged statute of limitations had expired, but this time, by a heavyweight Caucasian male! That this heavyweight Caucasian male burst into his office, a day after the Statute of Limitations had expired, and forcefully left the papers, all of this, while Appellant was seeing a patient! Keep in mind, the motions and all other filed

pleadings had stated up to this point that Appellant was never personally served. **(Affidavit of Setti S. Rengachary, M.D.).**

By a thorough examination of the affidavits, together with the pleadings, and all other documentary evidences filed in the instant action, there, at the very least, exists a genuine factual issue on whether Appellant, Dr. Rengachary, was served on March 11, 2004, before the Statute of Limitations allegedly expired, as stated in Appellee's returns of service. Not only did Ms. Wincel's Returns of Service state she served Appellant on March 11, 2004, her testimony during the evidentiary hearing ordered by the trial court was entirely consistent with this fact as well. **(Transcript of the September 29, 2004 Evidentiary Hearing, pgs. 13-40)**

As is in this underlying proceeding, when a factual dispute exists, and reasonable minds could differ, the question can only be answered by a jury, when one has been demanded by the Plaintiff, not a Court. This is all notwithstanding the fact that Appellant's motions are premised on facts in direct contradiction to any affidavit filed on behalf of Appellant. **Not only is there a factual dispute between Appellant and Appellee, there is also a factual dispute between Appellant himself, or, in the alternative, Scott A. Saurbier, Esq. violated MCR 2.114.**

Appellant is blatantly asking this Honorable Court to ignore the fact that Appellant's motions and affidavits conflict. Appellant's motions clearly state that Appellant was never personally served and yet his affidavit states that Appellant was personally served, but after the statute of limitations had expired. Appellant likes to call this dissimilarity as only a "perceived" difference in language. Unfortunately, this logic would be the equivalent of the little man behind the curtain pretending to be an all and powerful wizard, and after his true identity is exposed, to ask Dorothy, tin man, scarecrow, and the lion, not to pay any attention to the man behind the curtain, and would like them to still believe he is an all and powerful wizard, as in the movie

"Wizard of Oz." Whether Appellant was properly and personally served within the statute of limitations, is one of the central issues at hand, and the discrepancies argued by Appellant should not be disguised as a mere difference in language.

On October 22, 2004 the circuit court enters an Order dismissing Appellant, Setti S. Rengachary, M.D., pursuant to MCR 2.116(C)(7), ruling Appellee's claims are time barred by the Statute of Limitations. **(Order Dismissing Setti S. Rengachary, M.D.)** Appellant, Setti S. Rengachary, M.D., is the only named Defendant who was an agent and not a corporate entity.

On April 20, 2005, the circuit court enters an Order granting summary disposition as to the remaining Defendants, The Detroit Medical Center, Harper-Hutzel Hospital, and University Neurosurgical Associates, P.C., pursuant to MCR 2.116(C)(7), again ruling, Appellee's claims are time barred by the Statute of Limitations. **(April 8, 2005 Hrg. Transcr. Pgs.1-18)** Appellants successfully argued to the circuit court that because Appellant, Setti S. Rengachary, M.D., was dismissed for not being served within the Statute of Limitations, that all claims against the entities Detroit Medical Center, Harper-Hutzel Hospital, and University Neurosurgical Associates, P.C., cannot be maintained because Appellant, Setti S. Rengachary, M.D., the only individual agent served was not timely served.

Defendants-Appellants' Application for Leave revolves around two central issues, both premised on long standing Michigan Jurisprudence precedent and correctly stated and ruled on by the Court of Appeals: (1) When a Statute of Limitation Motion is brought under the purview of MCR 2.116(C)(7) in a cause of action where a jury has been timely demanded, are disputed questions of fact as to whether the Defendant, Setti S. Rengachary, M.D., was timely served within the Statute of Limitations, issues to be decided by a Jury; and (2) whether the remaining

principals to the negligent agent, Setti S. Rengachary, M.D., can be held vicariously liable, when the negligent agent has escaped liability by virtue of the statute of limitations.

In their Application, Defendants-Appellants state that the Court of Appeals erred in its Opinion and mangled the language of MCR 2.116(I)(3). This Honorable Court shall clearly see that, as has been the case throughout the underlying proceedings, Defendants-Appellants fail to cite an ounce of authority supporting their position.

For all of the reasons stated so below, the record, the pleadings, and based on the Opinion by the Court of Appeals, Appellee respectfully requests this Honorable Court deny Defendants-Appellants' Application for Leave to Appeal in its entirety.

PERTINENT TIMELINE OF TRIAL COURT PROCEEDINGS

1. **September 16, 2003**, Notice of Intent was served on all Defendants-Appellants, including, Dr. Rengachary, on behalf of Appellee. **(Notice of Intent)**

2. **March 10, 2004**, the instant Complaint and Jury Demand was filed in the above cause of action. **(Complaint and Jury Demand)**

3. **March 11, 2004**, all Defendants-Appellants, including Appellant, Dr. Rengachary, were personally served, by Lois Wincel, a Complaint, Jury Demand, and First and Second sets of Interrogatories and Requests to Produce. Attached hereto as **(EXHIBIT 1)** are filed returns of service.

4. **April 12, 2004**, Appellee filed the returns of service as to all Defendants-Appellants with this Honorable Court. **(EXHIBIT 1, Returns of Service)**

5. **April 15, 2004**, Appellee's Counsel receive, through facsimile transmission, the Motions for Summary Disposition, pursuant to MCR 2.116(C)(2), (3), (7), (8), ***as well as an***

Answer on behalf of Appellant Dr. Rengachary, although the pleadings had not been filed with the Court, as required in the above mentioned discussions and stipulations. **Appellant Setti S. Rengachary M.D. states in his motions, signed by Scott A. Saurbier, Esq. of Saurbier & Siegan, P.C., that he was never personally served with process.**

6. **April 16, 2004**, Appellee files Default against all Defendants-Appellants, including, Dr. Rengachary, for failing to timely file responsive pleadings, as required by Stipulation.

7. **April 23, 2004**, Defendants', including, Dr. Rengachary, file a Motion to Set Aside Entry of Default, Objection to Plaintiff's Notice of Entry of Default against All Defendants and For Costs of $3,500.00.

8. **May 7, 2004**, Appellee files Responses to Motions for Summary Disposition.

9. **May 13, 2004**, Appellant, Dr. Rengachary, serves a reply to Appellee's Responses to his Motions of Summary Disposition and serves an affidavit, for the very first time, regarding his service of process. **(EXHBIIT 2, Affidavit of Setti S. Rengachary, M.D.)**

10. **September 2004**, Appellee files Supplemental Brief in Support of Plaintiff Abdul Al-Shimmari's Response to Motion for Summary Disposition under MCR 2.116(C) (2), (3), (7), (8) to Dismiss Setti S. Rengachary, M.D. for Lack of Proper Process and Service Within the Statute of Limitations, whereby, among other things, objects to the court holding an evidentiary hearing.

11. **September 29 and October 4, 2004**, Trial Court, without any party requesting one, sua sponte in chambers on May 14, 2004, ordered and held an evidentiary hearing, as to whether Appellant, Dr. Rengachary, had been served with process prior to the expiration of the Statute of Limitations. **(EXHIBIT 3, Transcript from September 29, 2004 Evidentiary**

Hearing) and (EXHIBIT 4, Transcript from October 4, 2004 Continued Evidentiary Hearing)

12. **October 22, 2004**, Trial Court enters an Order dismissing Appellant, Setti S. Rengachary, M.D., pursuant to MCR 2.116(C)(7). **(Order Dismissing Setti S. Rengachary, M.D.)**

13. **April 20, 2005**, Trial Court grants Defendants-Appellants', The Detroit Medical Center, Harper-Hutzel Hospital, and University Neurosurgical Associates, P.C., Motion for Summary Disposition pursuant to MCR 2.116(C)(7), expiration of the Statute of Limitations.

COURT OF APPEALS OPINION

ISSUE #1: When a Trial Court orders an immediate trial pursuant to MCR 2.116(I)(3), to decide disputed preliminary questions of fact, specifically, whether Defendant, Setti S. Rengachary, M.D., was served with process prior to the expiration of the Statute of Limitations, must the immediate trial be a trial by jury, when a jury demand has been timely filed.

Although the Court of Appeals openly admits that this exact issue has never been addressed previously by Michigan courts, its clear that its conclusions of law and its Opinion is based on long standing Michigan precedent. Michigan law is clear in that whether a Defendant has been served with process prior to the expiration of the statute of limitations is purely a question of fact and questions of fact are to be determined by the jury.

The Court of Appeals began its analysis with the obvious conclusion that the Appellant, Setti S. Rengachary, M.D., had filed a Motion for Summary Disposition pursuant to MCR 2.116(C)(7), among (C)(2), (3), (8), (10), and the Trial Court ruled that pursuant to MCR

2.116(C)(7), the Statute of Limitations barred Appellee's claim. It then correctly pointed out that under Michigan law, a Court is to consider all documentary evidence submitted for the motion, whether it is for or in opposition of the motion. By reviewing the documentary evidence and viewing any uncontradicted allegations in the nonmovants favor, the Trial Court must then ascertain, as a matter of law, whether a factual dispute exists as to whether Plaintiff's claim is time-barred.

The Court of Appeals then moved its analysis to MCR 2.116(I), which reads in pertinent part:

> Rule 2.116 Summary Disposition.
> (I) Disposition by Court; Immediate Trial.
> (1) If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.
> (2) If it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.
> (3) A court may, under proper circumstances, order immediate trial to resolve any disputed issue of fact, and judgment may be entered forthwith if the proofs show that a party is entitled to judgment on the facts as determined by the court. An immediate trial may be ordered if the grounds asserted are based on subrules (C)(1) through (C)(6), or if the motion is based on subrule (C)(7) and a jury trial as of right has not been demanded on or before the date set for hearing. If the motion is based on subrule (C)(7) and a jury trial has been demanded, the court may order immediate trial, but must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury. *(emphasis added)*

As the clear and unambiguous language of the above court rule reads, a Trial Court may, upon proper circumstances, order an immediate trial to resolve disputed issues of fact. The Court of Appeals then stated that the central issue to be answered is whether a disputed question of fact, as to the issue of service of process within the Statute of Limitations, which would forever bar Plaintiff's claim if granted, and was the sole issue premised in Defendant-Appellant's Motions for Summary Disposition, is to be decided by a jury or judge. With this question

answered, the clear and unambiguous language of the above court rule then provides what procedural route a Trial Court must follow.

The Court of Appeals properly ruled that a factual dispute as to the issue of service of process, when directly related to a Motion for Summary Disposition under MCR 2.116(C)(7), is a factual issue, and factual issues are issues to be decided by the jury. This correct conclusion is clearly supported by long standing Michigan jurisprudence.

The Court of Appeals found the case of *Kermizian v. Sumcad, M.D., 188 Mich App 690; 470 NW2d 500 (1991)*, to be the closest Michigan authority on point, *when discussing MCR 2.116(C)(7) with the immediate trial option found in MCR 2.116(I)(3)*. As clearly explained in its Opinion, the *Kermizian* Court resolved a previous split among the Court of Appeals panels regarding a preliminary factual issue in the context of a MCR 2.116(C)(7) motion. The *Kermizian* Court strongly adopted the reasoning in *Moss v. Pacquing, 183 Mich App 574; 455 NW2d 339 (1990)*, and concluded that MCR 2.116(I)(3) required a jury trial when there exists a disputed preliminary factual issue in the context of a MCR 2.116(C)(7) motion.

Although the facts in the *Kermizian* and *Moss* cases did not specifically deal with preliminary disputed questions of fact in relation to the issue of service of process and the Statute of Limitations, they did discuss preliminary questions of fact in relation to the discovery of a Plaintiff's claim and the Statute of Limitations, and the logic used and found in those opinions, which is stare decisis, clearly applies to the set of facts in the underlying cause of action.

Additionally, the Court of Appeals also bases its legal conclusion on this Honorable Court's examination of the scope of the right to trial by jury in *Phillips v. Mirac, Inc., 470 Mich 415; 685 NW2d 174 (2004)*. In *Phillips*, this Honorable Court emphasized that the only matters

properly within the province of the jury are questions of fact, with all other questions, being questions of law, being for the court.

ISSUE #2: Under Michigan law, can a timely served principal Defendant still be held vicariously liable for its negligent agent, even though the agent has escaped liability because of the Statute of Limitations.

Again, the Court of Appeals looked to long standing Michigan precedent, when it concluded that a principal may still be held liable for its dismissed negligent agent, so long as the agent's dismissal was not an adjudication on the merits.

The Court of Appeals correctly reviewed the cases cited to by Defendants-Appellants in support of their position, *Kambas v. St. Joseph's Mercy Hospital of Detroit, 33 Mich App 127, 189 NW2d 879 (1971)* and *Dyke v. Richard, 40 Mich App 115' 198 NW2d 797 (1972)*, and determined that the factual scenarios in those cases were far different from the factual scenario in the instant case. In the underlying cause of action, it is undisputed that the principal Defendants were all served within the applicable statute of limitations, a far different situation then the cases cited above.

Contrary to the legal proposition Appellants' proffer, the law in the State of Michigan does not require that the agent be named as a defendant, when one has also sued the principal, on the theory of vicarious liability. *Cox v. Board of Hospital Managers for the City of Flint, 651 Mich 1, 651 NW2d 356.* For example, what happens when a plaintiff has only sued the agent's principal, on a theory of vicarious liability, and the statute of limitations then subsequently runs against the agent. According to Appellants' argument, the principal can then turn around and file a motion for summary disposition because the claim against the agent is now barred by the statute of limitations, and now the plaintiff has no viable claim against the principal because the

statute that protects an agent is equally available to the principal. Scenarios such as this are why Appellants' common theme is not even plausible!

Appellants' also briefly touch upon, but again, with no legal authority other than the use of Black's Law Dictionary, the argument that Appellants' can no longer be liable because the order dismissing Dr. Rengachary pursuant to MCR 2.116(C)(7), statute of limitations, had the added words "with prejudice," and thus there was an adjudication of the merits of Appellee's claim. Appellants have offered no Michigan precedent to support this broad and inaccurate legal proposition here, when applied to the facts of this case.

Any way one looks at it however, Appellants' propositions are contrary to Michigan law, contrary to logic, and contrary to sound principle. **Under Michigan law, it is clear that a decision on the basis of the statute of limitations is not a decision on the merits, as was the case here.** *Bd. Of County Rd. Comm'rs v. Schultz, 205 Mich App 371, 521 NW2d 847, 850 (1994)*

The Court of Appeals moved its analysis by interpreting solid Michigan precedent. In essence, the Court of Appeals correctly held that because a Plaintiff may sue an agent and a principal, together, or individually, a dismissal of the agent, will not bar the principal's liability, if there has been no adjudication on the merits. The Court of Appeals correctly applied cases such as *Larkin v. Otsego Memorial Hospital, 207 Mich App 391; 525 NW2d 475 (1994); Nippa v. Botsford General Hospital, 257 Mich App 387; 668 NW2d (2003); Cox v. Flint Board of Hospital Managers, 467 Mich 1; 651 NW2d 356 (2002)*.

In essence, the Court of Appeals correctly held that because Dr. Rengachary's dismissal was based on the statute of limitations, which is not an adjudication on the merits, the remaining

principal defendants may still be held liable for Dr. Rengachary's negligent acts, since it is undisputed that they had been timely served with process.

ARGUMENT

I. **THE COURT OF APPEALS PROPERLY REVERSED THE WAYNE COUNTY CIRCUIT COURT'S ORDER GRANTING SUMMARY DISPOSITION, PURSUANT TO MCR 2.116(C)(7), TO DEFENDANT-APPELLANT, SETTI S. RENGACHARY, M.D., BASED UPON THE EXPIRATION OF THE STATUTE OF LIMITATIONS, WHEN THERE WAS A DSIPUTE AS TO WHETHER DEFENDANT-APPELLANT HAD BEEN SERVED WITH PROCESS PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS, AND THUS, AT THE VERY LEAST, PRESENTED A QUESTION OF FACT FOR THE JURY TO DECIDE, WHEN PLAINTIFF-APPELLEE DEMANDED A TRIAL BY JURY.**

STANDARD OF REVIEW

In reviewing a grant of summary disposition, appellate courts review the question de novo. *Spiek v. Dep't of Transportation, 456 Mich 331; 572 NW2d 201 (1998)*.

A motion for Summary Disposition under ***MCR 2.116(C)(7)*** does not test the merits of a claim but rather certain defenses, which may make a trial on the merits unnecessary. When deciding such a motion, the court must accept all well-pled allegations of the nonmoving party as true. *DMI Design and Manufacturing, Inc., v. ADAC Plastics, Inc., 165 Mich App 205; 418 N.W. 2d 386 (1987)*. Affidavits, depositions, admissions, or other documentary evidence may be submitted by a party to support or oppose grounds asserted in the motion. *MCR 2.116(G)(2)*. The affidavits, together with the pleadings, depositions, admissions and documentary evidence then filed in the action or submitted by the parties must be considered by the court when the motion is based on this subrule. *MCR 2.116(G)(5)*. If the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the trial court is to render judgment without delay. *MCR 2.116(I)(1)*. **It is proper to grant a motion for summary disposition only where no factual dispute exists between the parties or where the pleadings show that a party is entitled to judgment as a matter of law. Only if the facts are not in dispute and reasonable minds could not differ**

concerning the legal effect of those facts, can a court decide as a matter of law, whether a claim is barred by legal immunity. *Xu v. Gay, 257 Mich App 263, 267; 668 N.W. 2d 166 (2003); Diehl v. Danuloff, 242 Mich App 120, 123; 618 N.W. 2d 83 (2000)*

A. Pursuant to MCL 600.5838a, Other Than A Few Exceptions, A Claim For Medical Malpractice Against A Licensed Health Care Professional And/Or Licensed Health Care Facility, Must Be Filed Within Two Years From The Date Of The Act Or Omission That Is The Basis For The Malpractice Action

The 1986 Tort Reform Act imposed a two-year statute of limitations that applies only to actions for health care malpractice. *MCL 600.5838a, MCL 600.5805(5)*. In 1993, statutory amendments did extend the scope of licensed professionals falling under the malpractice umbrella. For example, the malpractice statute applies to malpractice claims against a license health care professional, a licensed health care facility or agency, and a health care facility's or agency's employees or agents who engaged in or otherwise assisted in rendering medical care or treatment. *MCL 600.5838a(1)*.

The term licensed health care professionals under MCL 600.5838a are those professionals defined by MCL 333.16101 et. seq. and includes the following: nursing, optometry, pharmacy, podiatric medicine and surgery, dentistry, chiropractic, counseling, medicine (including physicians assistants), occupational therapists, osteopathic medicine and surgery, physical therapy, and psychology.

The term licensed health care facility under MCL 600.5838a is defined in MCL 333.20106 et. seq. and includes the following: ambulance operation, clinical laboratory, county medical care facility, freestanding surgical outpatient facility, HMO, home for the aged, hospital, nursing home, hospice, or one of the above located in a correctional institution, college, or other educational institution.

MCL 600.5838a clearly provides that a claim for medical malpractice must be filed within two years from the date of the act or omission that is the basis for the malpractice. The statute of limitations is tolled by the filing of the statutory notice of intent to sue. A Complaint may be filed after the notice period of 182 days has run, *MCL 600.2912b(1)*; after the expiration of 154 days from the date notice was given, if the notice party fails to provide the required written response, *MCL 600.2912b(8)*; and any time during the 182 day period if the notice party informs the claimant in writing of his or her intent not to settle within the notice period, *MCL 600.2912b(9)*.

Within 154 days after receipt of the notice of intent, the health care professional or facility is required to provide the claimant or his or her representative with a written response that essentially must contain the factual basis for any defense to the claim, the standard of care alleged to apply to the case, the manner in which the noticed health care professional or facility contends that there was compliance with the standard of care, and the manner in which the health care professional or facility contends that the alleged negligence was not the proximate cause of the claimant's injuries. *MCL 600.2912b(7)*.

By examining the pertinent facts of the underlying cause of action, there is no dispute of the following:

1. On September 17, 2001, per Plaintiff's Complaint and Affidavit of Merit by Gary Lustgarden, M.D., negligence was committed upon Appellee, by Appellant, Setti S. Rengachary, M.D.;
2. On September 16, 2003, Plaintiff served Notice of Intent on all Appellants, including Setti S. Rengachary, M.D.;

3. Appellants failed to provide the required written response within the notice of intent period, entitling Appellee to file the underlying Complaint and Jury Demand after 154 days from September 16, 2003;
4. 182 days from September 16, 2003 was March 17, 2004;
5. On March 10, 2004, Plaintiff timely filed the underlying Complaint and Jury Demand;
6. On March 11, 2004, Appellants, The Detroit Medical Center, Harper-Hutzel Hospital, and University Neurosurgical Associates, P.C., were served with process in the underlying cause of action, within the statute of limitations, by personal service and certified mail (trial court made findings of fact as to a disputed issues pertaining to Appellant's Motion for Summary Disposition under MCR 2.116(C)(7), and ruled Appellant, Setti S. Rengachary, M.D., was not served within the statute of limitations)

On March 10, 2004, the law in Michigan, per this Honorable Court's ruling in *Gladych v. New Family Homes, Inc., 468 Mich 594; 664 NW2d 705 (2003)*, was that in order to preserve a claim, and as a matter of law, per *MCL 600.5856*, a Plaintiff must file the complaint ***and*** serve a copy of the summons and complaint upon the Defendant or file the complaint ***and*** place a copy of the summons and complaint in good faith in the hands of an officer for service, prior to the expiration of the Statute of Limitations. Since *Gladych* however, *MCL 600.5856*, has been amended and has the practical effect of reinstating prior precedent under *Buscaino v. Rhodes, 385 Mich 474; 189 NW2d 20 (1971)*; the statute of limitations is tolled when a timely complaint is filed, as long as the complaint is served prior to the expiration of the summons. Appellants attempt to analogize and compare *Gladych* with the underlying cause of action, stating that this Honorable Court never mentioned the right to trial by jury, however, this comparison clearly is a mischaracterization of the Court of Appeals Opinion, as, unlike the underlying cause of action,

Gladych purely dealt with a matter of law, and there were no preliminary factual matters in dispute. In essence, this Honorable Court in *Gladych* had to apply undisputed facts to its interpretation of the law. This is far different from the underlying cause of action.

Under Gladych, in order to preserve his claim, as a matter of law, Plaintiff-Appellee had to file his complaint and either serve a copy of the summons and complaint to the Defendant per a method under MCR 2.105 or deliver in good faith the summons and complaint to the hands of an officer for service, prior to March 17, 2004.

B. A Motion For Summary Disposition Under MCR 2.116(C)(7) May Only Be Granted By The Trial Court If No Material Factual Dispute Exists Between The Parties Regarding The Circumstances Which Provide The Basis For The Motion

A fundamental part of Michigan jurisprudence, as it relates to motions for summary disposition, is that summary disposition is only proper if no material factual dispute exists between the parties regarding the circumstances which provide the basis for summary disposition. *Moss v. Pacquing, 183 Mich App 574; 455 NW2d 339 (1990); Gojcaj v. Moser, 140 Mich 828; 366 NW2d 54 (1985), citing Kropff v. City of Monroe, 128 Mich App 450; 340 NW2d 119 (1983).*

Defendants-Appellants contend, through their submitted documentary evidences, affidavits, and oral testimony, that Setti S. Rengachary, M.D., was not served with process prior to the expiration of the statute of limitations. The Trial Court granted Defendant-Appellant's Motion pursuant to MCR 2.116(C)(7), ruling that Plaintiff-Appellee's claim against Dr. Rengachary was time barred as a matter of law. The statute of limitations is an affirmative defense, which, if shown through undisputed facts, forever bars Plaintiff's claim.

In the underlying cause of action, in order for the Trial Court to determine as a matter of law that Plaintiff's claim is barred because of the expiration of the statute of limitations, it must

be shown, through undisputed facts, that Plaintiff failed to file the underlying complaint ***and*** failed to either serve a copy of the summons and complaint upon Defendants or place a copy of the summons and complaint in the hands of an officer for service by March 17, 2004.

By examining the record below, it is undisputed that Plaintiff timely filed his complaint with the Wayne County Circuit Court on March 10, 2004. By examining the record below, it is also undisputed that Plaintiff served, in a manner allowed under MCR 2.105, Defendants-Appellants, The Detroit Medical Center, Harper-Hutzel Hospital, and University Neurosurgical Associates, P.C., within the prescribed statute of limitations period. Therefore, the only way the Trial Court can determine that Plaintiff-Appellee's claim is barred against Defendant-Appellee, Setti S. Rengachary, M.D., by the running of the statute of limitations, as a matter of law, is if it is undisputed that Dr. Rengachary was not served with process prior to March 17, 2004.

Whether there is a disputed question of fact presented, is a question of law, properly addressed by the Trial Court. *Flynn v. McLouth Steel Corporation, 55 Mich App 669; 23 NW2d 297 (1974)*. Only where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, can a Trial Court grant or deny a motion for summary disposition regarding whether the statute of limitations bars a Plaintiff's claim.

In the underlying cause of action, the Trial Court, as a matter of law, had a duty to determine whether a disputed question of fact existed between the parties, as it relates to Plaintiff's claim being time barred. The Court of Appeals correctly ruled that with regard to determining whether there is a factual dispute in conjunction with a motion under MCR 2.116(C)(7), is somewhat similar to the standard for determining whether summary disposition is proper under MCR 2.116(C)(10) because of the absence of a genuine issue of material fact, however, on its face the standard under MCR 2.116(C)(7) appears slightly different. Regardless,

the Court of Appeals further correctly held that the difference between the two standards is so slight that it would be difficult to meaningful apply.

A motion under **MCR 2.116(C)(10)** tests whether there is factual support for a claim. The standard is whether, when the evidence is considered in the light most favorable to the nonmoving party, there is a genuine issue of material fact. *Ritchie-Gamester v. City of Berkley, 461 Mich 73; 597 N.W. 2d 517 (1999)*. The nonmovant receives the benefit of all reasonable inferences. *Hall v. McRea Corp., 238 Mich App 361; 605 N.W. 2d 354 (1999)*. The benefit of the doubt is given to the existence of a genuine issue of material fact. *Marlo Beauty Supply, Inc. v. Farmers Ins. Group, 227 Mich App 309, 320, 575 N.W. 2d 324 (1998)*. If the record, when viewed in this way, leaves open an issue on which reasonable minds could differ, summary disposition is inappropriate. *Allstate Ins. Co. v. Department of Mgmt. & Budget, 259 Mich App 705, 675 N.W. 2d 857 (2003)*. **Summary disposition is never appropriate in cases where credibility, intent or state of mind is crucial**. *Michigan National Bank-Oakland v. Wheeling, 165 Mich App 738, 419 N.W. 2d 746 (1988)*. **Findings of fact may not be made or credibility weighed by a court deciding a summary disposition**. *Skinner, supra.* **Thus, when the truth of a material factual assertion depends on credibility, a genuine factual issue exists and summary disposition may not be granted**. *Metropolitan Life Ins. Co. v. Reist, 167 Mich App 112, 421 N.W. 2d 592 (1988)*.

It is clear as the big blue sky that, at the very least, a factual dispute exists as to whether Defendant was served with process within the statute of limitations!

Some examples of the numerous contradictions and inconsistencies made by Appellant, Dr. Rengachary and Appellant's witness, Lakesha Newson, made throughout the attached

transcripts of the Evidentiary Hearings ordered by the Tower Court **(EXHIBITS 3 and 4)** and all other pleadings filed with the trial court are as follows:

1. Initially claiming his associate Dr. Guthikonda notified him on March 18, 2004 as stated in his initial motion for summary disposition, then, one month later, signing an affidavit claiming a heavy set Caucasian male personally served him on March 18, 2004.
2. Dr. Rengachary, states at **(EXHIBIT 4, pg. 27)**, that the March 18, 2004 Caucasian male wore dark rimmed glasses and a brown khaki uniform. Ms. Newson's testimony differs by stating that the March 18, 2004 Caucasian male wore a black jacket and not a khaki uniform **(EXHIBIT 4, pg. 47)**. And then in direct contradiction of what she had first testified to on pg. 47, Ms. Newson states the Caucasian male wore a white jacket, not a black jacket or a khaki uniform. **(EXHIBIT 4, pg. 84)**.
3. Appellant, states at **(EXHIBIT 4, pgs. 10-11 and pgs. 26-27)**, with 100% certainty, accuracy, and knowingly under oath, that Mark Daoudi, the cousin of Michael S. Daoudi, Esq., who was sitting in the last row of the lower courtroom, on September 29, 2004, and is a Swedish citizen who was residing in Sweden during the whole month of March 2004, was the March 18, 2004 Caucasian male who allegedly personally served him. Testimony initially brought out by Defense attorney Scott A. Saurbier **(EXHIBIT 4, pgs. 10,11)** . Appellant later changes his testimony and states he was not 100% certain **(EXHIBIT 4, pgs. 27-28)**, and then stipulates that he was 100% wrong, when the cousin of Michael S. Daoudi, enters the Courtroom.**(EXHIBIT 4, pgs. 82-83)**.
    a. A fact to know is that Appellant had 3 hours on September 29, 2004 to observe the cousin of Michael S. Daoudi, who is a Swedish citizen, from 2:00 pm to 5:00 pm. Then, on October 4, 2004, immediately after the cousin of Michael S.

Daoudi, who is a Swedish citizen, entered the courtroom, Appellant retracted his 100% confirmation, observed on September 29, 2004, that he was served by the cousin of Michael S. Daoudi, who is a Swedish citizen, on March 18, 2004.

4. Ms. Newson testifies at **(EXHIBIT 4, pg. 44-45, 48-50, and 84-85)**, and describes to a "tee" and knowingly stated under oath, that attorney Kenneth M. Gonko, was the March 18, 2004 Caucasian male who allegedly personally served Dr. Rengachary. **(EXHIBIT 5, Affidavit of Kenneth M. Gonko, Esq.)** Testimony initially brought out by Defense attorney Scott A. Saurbier.

   a. A fact to know is that Ms. Newson had 3 hours on September 29, 2004 to observe Kenneth M. Gonko from 1:45 pm to 4:00 pm.

During the October 4, 2004 hearing, Appellee's Counsel identified Kenneth M. Gonko, Esq. as the person who the Appellant's Witness Lakesha Newson asserts as the heavyset Caucasian male who served Appellant, Dr.Rengachary, on March 18, 2004. Appellee's counsel asked to call this witness for testimony in the October 4, 2004 hearing. The trial court precluded and prevented this witness from being called, based on the mere fact the trial court knew its decision before even concluding the hearing. The trial court specifically stated:

> **MR. DAOUDI:** Your Honor, there's one witness we need to call but he's not here.
> The person that was sitting there was an attorney in a settlement conference representing the school that was he -- and I talked to him. And he was in a suit, and he was a Caucasian male. We could bring him into the court and ask him. He was sitting right there the whole time.
> **THE COURT:** All of this is peripheral to the decision I have to make. And there's no sense in cutting up the record with more testimony and the issue of whether or not Dr. Rengachary was served prior to the expiration of the Statute of Limitations, which is what this hearing is all about.
> **MR. DAOUDI:** Yes.

THE COURT: So it doesn't matter who barged into the office on the 18th, it's kind of irrelevant at this time.
MR. DAOUDI: We're not saying anybody barged in this office, that's our position.
THE COURT: I know that's what you're saying. And I understand the other side's position as well.
MR. DAOUDI: But in terms of protecting the credibility of the witness that just spoke, that attorney will definitely say that he did not barge in. She's actually identified him, it would go to her credibility as to who -- that's the whole story of this March 18th story.
THE COURT: That's assuming the Court needs anymore testimony.
(October 4, 2004 hearing, pgs. 85-86, EXHIBIT 4)

The Court of Appeals commits three pages of its Opinion, citing numerous examples supported by logical reasoning, to correctly point out that a clear factual dispute exists as to whether Dr. Rengachary was served with process within the Statute of Limitations. Appellants urge this Honorable Court to believe a question of fact does not exist, as Ms. Lois Wincel, Plaintiff's process server had suspicious testimony, thus barring Plaintiff's claim as a matter of law. The Court of Appeals does an excellent job explaining why her testimony is not so suspicious and, at the very least, creates a version of events that is not so implausible that a reasonable jury would be precluded from believing Ms. Wincel.

C. *When Defendant's Motion Is Pursuant to MCR 2.116(C)(7), Specifically The Statute Of Limitations Defense, And There Is A Factual Dispute As To Whether Defendant Received Service Of Process Prior To The Expiration Of The Statute Of Limitations, A Trial Court May, Pursuant To MCR 2.116(I)(3), Order An Immediate Trial To Decide The Factual Dispute*

The Court of Appeals correctly ruled that a Trial Court has certain procedural options when a preliminary factual dispute exists between the parties. By the clear and unambiguous language of the court rule, a Trial Court may, under motions premised under MCR 2.116(C)(1)-(6), and MCR 2.116(C)(7), order an immediate trial to decide the disputed questions of fact.

In declining to follow *Blana v. Spezia, 155 Mich App 348; 399 NW2d 511 (1986)*, Justice Murphy, in *Moss, supra*, (and the reasoning adopted in *Kermizian, supra*), when examining the language of MCR 2.116(I)(3), paid the utmost attention to the words "....must afford the parties a jury trial as to issues raised by the motion as to which there is a right to trial by jury." *Moss at 580*. In dissecting when a factual dispute must be submitted to the jury, Justice Murphy carefully examined the notes following the court rule:

> Subrule (I) includes the provisions regarding disposition of the motion found in GCR 1963, 116.3 and 117.3. In addition, under subrule (I)(2), an immediate trial of disputed factual issues raised by a motion under subrule (C)(7) may be held despite the fact that jury has been demanded. ***The immediate trial would, however, be by jury. (emphasis added)***

Justice Murphy concluded that the issue of discovery, the (C)(7) issue which would have barred Plaintiff's claim as a matter of law in *Moss*, is an issue to which a right to a jury trial exists unless the facts are undisputed, when it relates to a motion under MCR 2.116(C)(7). Justice Murphy further reasoned that this interpretation was entirely consistent with the notes following the court rule, as so stated above. *Moss at. 581*

D. The What Happened, How, And When Of A Factual Dispute As To The Issue Of Whether A Private Process Server Served Defendant With Process Prior To The Expiration Of The Statute Of Limitations Are Purely Questions Of Fact For A Jury To Decide

The *Kermizian* and *Moss* cases both dealt with MCR 2.116(C)(7) motions, specifically, whether the statute of limitations forever barred the Plaintiff's claims. The issue presented to both courts, as in the underlying cause of action, is whether a factual dispute, having direct bearing on the statute of limitations, is a dispute that must be decided by a jury.

The *Kermizian* court relied on the fact that Michigan court's had previously held the discovery of a claim is an issue to be decided by a jury, unless the facts are undisputed. *Id.* It also heavily relied on the fact that the notes found after the court rule, specifically state, as

quoted above, that the immediate trial must be a trial be jury when the motion is pursuant to MCR 2.116(C)(7). This could only make the interpretation that a motion pursuant to MCR 2.116(C)(7) is a motion decided by a jury, if factual disputes exist between the parties, and a timely jury demand has been made.

The Court of Appeals is correct on its reliance on *Kermizian* and *Moss*, as they directly involve the same issue found in the underlying cause of action. The Court of Appeals cites to this Honorable Court's Opinion in *Phillips v. Mirac, Inc., 470 Mich 415; 685 NW2d 174 (2004)*, as this Honorable Court had an extensive discussion as to the role of the jury in legal proceedings. Quoting Harvard Law Professor Austin Wakeman Scott, this Honorable Court opined: "the only matter properly within the province of the jury are questions of fact. All other questions, being questions of law, are for the court." *Id. At 426*. This Honorable Court further quoted from Thomas Jefferson, "...JURIES therefore...determine all matters of fact, leaving to the permanent judges to decide the law resulting from those facts. *Id. At 427*. In supporting the conclusion that juries determine disputed questions of fact, this Honorable Court cited Michigan precedent. In quoting the case of *Charles Reinhart Co. v. Winiemko, 444 Mich 579; 513 NW2d 773 (1994)*, this Honorable Court held that "Juries traditionally do not decide the law or the outcome of legal conflicts...To maintain the traditional role of the jury, the jury must remain the factfinder; a jury may determine what happened, how, and when, but it may not resolve the law itself." *Phillips at 427*. This Honorable Court further cites Michigan precedent by stating "It is for the jury to assimilate the facts presented at trial, draw inferences from those facts, and determine what happened." *Id. At 428.*

The *Kermizian* and *Moss* courts both rely on the fact that Michigan precedent had held when there is a dispute concerning the date when a Plaintiff discovered a claim, the factual

determination is to be made by a jury. Unlike what Defendants-Appellants state in their Application for Leave, **for over 100 years, juries have been deciding issues of service of process in the State of Michigan**. In the case of *Newman v. Meddaugh, 131 Mich 595; 92 NW 102 (1902)*, this Honorable Court had to decide whether the lower court erred in submitting to the jury the question of whether the suit was commenced before a note was barred by the statute of limitations. The Plaintiff argued that what constitutes the commencement of suit is a question of law, and that whether the facts of a case showed a suit properly commenced would likewise be a question of law. *Id. At 595*. This Honorable Court directly disagreed with this argument and held that this could only be true if there were no dispute about the facts. *Id.* **The whole issue in *Newman* dealt with whether the Defendant was served papers prior to the expiration of the statute of limitations!**

In further support that a service of process issue should be decided by a jury if a question of fact exists, is found in the case of *Clabaugh v. Wayne County Judge, 228 Mich 207; 199 NW 710 (1924)*, **where this Honorable Court held that whether or not the return of service of process of the officer showing personal service on defendant's agent is true involves purely a question of fact**. *Id. At 212*.

As with factual disputes governing the date of accrual of a cause of action, *Flynn, supra,* the date a Plaintiff should have discovered a cause of action, *Kermizian, supra,* or whether Defendant was served with process, for statute of limitations purposes, long standing Michigan jurisprudence is clear in that these are questions of fact to be decided by a jury. In fact, Michigan precedent has ruled so far as to say a trial court's engagement in fact finding mandates reversal. *Kropf, supra, citing Baker v. Detroit, 73 Mich App 67; 250 NW2d 543 (1976)*.

In *Kropf, supra,* Defendants had filed a motion for summary disposition on the basis of a release. The appellate court held that this motion can only be granted if no material factual dispute exists between the parties. *Id. At 452*. The present day equivalent to a motion on the basis of a release, is a MCR 2.116(C)(7) motion, just like the underlying case. The court in *Kropf* held that when there was a factual dispute as to the underlying reason of the motion, the release, it was error for the trial court to make findings of fact.

The Court of Appeals was clearly correct in concluding that a factual dispute as to the issue of service of process, when it has a direct bearing on the statute of limitations defense, is a factual dispute to be decided by a jury. This conclusion comes from long standing Michigan precedent.

E. Under Michigan Law, A Complete Failure Of Service Of Process Within The Statute Of Limitations, Is Pursuant To MCR 2.116(C)(7), Not MCR 2.116(C)(3)

The Court of Appeals correctly points out in its Opinion that there is a diffrence between MCR 2.116(C)(3) and (7) motion. The Court of Appeals correctly holds that a motion based on MCR 2.116(C)(3) may involve fact finding by the trial court pursuant to MCR 2.116(I)(3), as there is not a permanent bar of a cause of action if this motion is granted.

Defendants-Appellants disingenuously and frivolously now argue in their Application, for the first time, that their motion falls under the purview of MCR 2.116(C)(3), not (C)(7). **(pg. 17, Defendants-Appellants Application for Leave)** Therefore, the Trial Court was allowed to make findings of fact with regards to the service of process issue. First and foremost, Defendants-Appellants argued the exact opposite to the Court of Appeals:

> **Dr. Rengachary's Motion for Summary Disposition on the Statute of Limitations issue, the only Motion heard, was brought under MCR 2.116(C)(7) and (8). The trial court did not hear any of the issues raised in the second Motion for Summary Disposition brought pursuant to MCR 2.116(C)(2),**

> **(3), (8). For this reason, Defendants-Appellants refuse to respond to the standard of review concerning any other grounds but (C)(7) and (8).**

(Defendants-Appellants Brief on Appeal, pgs. 20-21)

Furthermore, on pg. 31 of the same brief, Defendants-Appellants state "Dr. Rengachary was not claiming defects in service of process – that Lois Wincel was not a suitable person to serve process. Instead, both the Answer to Plaintiff's Complaint and the Motion for Summary Disposition pursuant to MCR 2.116(C)(7) and (8), raised the affirmative defense of the expiration of the Statute of Limitations." How in the world can they argue the exact opposite now to this Honorable Court?

Regardless of what Defendants-Appellants now argue, under Michigan law, it is clear their motion was argued as and granted pursuant to MCR 2.116(C)(7). A motion premised under MCR 2.116(C)(3) basically is stating that there has been a defect in the manner of service, *Holliday v. Townley, 189 Mich App 424; 473 NW2d 733(1991)* not that there has been a complete failure of service within the applicable Statute of Limitations.

II. THE COURT OF APPEALS PROPERLY REVERSED THE WAYNE COUNTY CIRCUIT COURT'S ORDER GRANTING DEFENDANTS-APPELLANTS', THE DETROIT MEDICAL CENTER, UNIVERSITY NEUROSURGICAL ASSOCIATES, P.C., HARPER-HUTZEL HOSPITAL, MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(7), BY CONCLUDINJG THAT A PRINCIPAL CAN BE HELD VICARIOUSLY LIABLE FOR THE NEGLIGENCE OF ITS AGENT WHEN AN AGENT HAS ESCAPED LIABILITY BY VIRTUE OF THE STATUTE OF LIMITATIONS.

A. It Is Well Established That Under The Doctrine of Vicarious Liability, A Principal Is Held To Be Liable For The Negligent Acts Of Its Agent, As A Principal And Agent Are One Of The Same

Vicarious liability is liability that is derivatively imposed. When a defendant is found to be vicariously liable, liability rests on the negligent conduct of another and is not based on the

defendant's own wrongdoing. Vicarious liability, which imputes the negligence of one party to another party, is based on a special relationship between the parties, such as employer-employee and principal-agent.

It is well established that a hospital/institution may be held vicariously liable for the negligent acts of its nurses, aides, physician employees, residents, interns, and auxiliary personnel actually employed by the hospital to render care and treatment to its patients. *McClaine v. Alger, 150 Mich App 306, 311-313, 388 NW2d 349 (1986)*. There is also no question that a corporation is liable for the negligence of its employees when that negligence is committed within the course and scope of the employment. This principle results from the traditional analysis that the servant is acting under the control of the master. Numerous Michigan cases have found the employer to be vicariously liable for the negligence of the employee. *Serinto v. Borman Food Stores, 380 Mich 637, 158 NW2d 486 (1968); White v. Bye, 342 Mich 654, 70 NW2d 780 (1955); Muth v. WP Lahey's Inc., 338 Mich 513, 61 NW2d 619 (1953)*. Furthermore, a defendant physician's professional corporation is vicariously liable for the physician's negligence. *MCL 450.226*.

In *Cox v. Board of Hospital Managers for the City of Flint, 651 Mich 1, 651 NW2d 356*, the Michigan Supreme Court held that a hospital/institution may be held vicariously liable for the acts of its agents. A hospital's vicarious liability arises because the hospital is held to have done what its agents have done. *Id. At 15*. The Court further opined:

> Vicarious liability is indirect responsibility imposed by operation of law. As this Court stated in 1871: The master is bound to keep his servants within their proper bounds, and is responsible if he does not. The law contemplates that their acts are his acts, and that he is constructively present at them all [citing *Smith v. Webster, 23 Mich 298, 299-300 (1871)(emphasis added)]*.

Vicarious liability imposes a legal fiction on the hospital providing that it will be liable because the law creates a practical identity with its agents, so the hospital is held to have done what the agents have done. *Id. At 11-12; Nippa v. Botsford General Hospital, 257 Mich App 387, 668 NW2d 628 (2003)*. For all practical purposes the hospital/institution stands in the shoes of its agents (the doctors). *Nippa, at 391.*

The case law cited by the Appellants and relied upon by the trial court is no longer good law and is not relevant to the facts of the underlying cause of action. Further, the Appellants have misled the lower courts and will be attempting to mislead this Honorable Court by not fairly explaining the facts of the cases they cite. Appellants' first cite the case of *Kambas v. St. Joseph's Mercy Hospital of Detroit, Michigan, 33 Mich App 127, 189 NW2d 879, which was reversed by 389 Mich 249, 205 NW2d 431(1973)*. **This case has nothing to do with the case at bar, and further has been overruled as a matter of law and has been superseded by statute.** See *Whitney v. Day, 100 Mich App 707, 300 NW2d 380 (1980)*.

In *Kambas*, the hospital employed registered nurses that gave the plaintiff prescribed injections while he was admitted to the hospital after a heart attack. The patient experienced swelling, discoloration, and disability in his arms. Claiming negligence in the administration of the drug, plaintiff brought an action against the hospital almost three years later. The plaintiff in Kambas did not sue any defendants until after the two-year malpractice statute of limitations had expired. **The issue in the *Kambas* case is whether the two year malpractice statute of limitations applied to nurses or whether the three year ordinary negligence statute of limitations applied**. The court held that the two-year statue applied and that the case was not timely against any of the defendants. In the case at bar, there is absolutely no factual dispute that Appellee's lawsuit was timely filed and served against Appellants, University Neurosurgical

Associates, P.C., Detroit Medical Center, and Harper-Hutzel Hospital. Since this lawsuit was filed in a timely manner Kambas would be irrelevant even if it were good law.

The issue before this Honorable Court is the impact of the dismissal of an agent pursuant to the statute of limitations upon the vicarious liability of the principal when there is no question that the case is timely against the principal. The facts in this case are completely different than the facts in *Kambas.*

The Appellants' also cite *Dyke v. Richard, 40 Mich App 115, 198 NW2d 797, 799-800 (1972)*. ***Dyke*** **is also totally factually distinguishable from the underlying case and further has been overruled as a matter of law and has been superseded by statute.** See *Morgan v. Taylor, 434 Mich 180, 451 NW2d 852 (1990)*. In the *Dyke* case, Plaintiffs were involved in an automobile accident and received injuries which were treated by Defendant Dr. Feller and Defendant St. Joseph Hospital. Plaintiff claimed Dr. Feller was negligent in failing to properly diagnose the injuries on the date of the accident and alleged the hospital was liable on the theory that Dr. Feller was its agent. Defendants moved for accelerated judgment on the grounds that the suit was started more than two years after the last service rendered by Dr. Feller. The trial court granted Defendants' motion for accelerated judgment on the grounds that the two-year malpractice statute of limitations had run against all the defendants.

Again, as stated above when discussing *Kambas*, the issue before this Honorable Court is the impact of the dismissal of an agent pursuant to the statute of limitation upon the vicarious liability of the principal when there is no question that the case is timely against the principal. The facts in this case are completely different than the facts in *Dyke*

The Appellants also cite *Lowery v. State Wide Health Care Service, Inc. 585 So.2d 778 (1991)*. **Again, consistent with Appellants' providing a misleading theme of case law,**

***Lowery* is totally factually distinguishable from the underlying cause of action.** In the *Lowery* case, plaintiffs attempted to bring in a principal, whose liability was predicated solely upon the doctrine of respondeat superior, after the statute of limitations had expired as to the agent. Plaintiffs had argued a six year statute of limitations applied, while in fact, the court ruled that the two year malpractice statute of limitations had applied instead. The principal was not served with process until after the two years had already expired. Again, in the underlying cause of action, the principals were clearly all served within the applicable statute of limitations.

There is no question that that the two year malpractice statute of limitations against an agent equally protects those on whose behalf he acted as agent. However, Appellants' fail to place this proposition in context and were not being fully candid with the lower courts and are not being candid with this Honorable Court. The facts in *Dyke* are exactly the same as the facts in *Kambas*, which are exactly the same as the facts in *Lowery*. In all three cases, the plaintiff failed to serve the hospital/principal within the applicable statute of limitations period. **It is clear and not in dispute that in the underlying cause of action, Appellants, University Neurosurgical Associates, P.C., Detroit Medical Center, and Harper-Hutzel Hospital have all been properly served with process within the applicable malpractice statute of limitations.**

B. A Release, A Previous Adjudication On The Merits, Or An Abandonment Or Relinquishment Of A Right Or Claim Will Only Bar A Principal's Liability For Its Agent's Negligence

Under common law and case precedent, as a matter of procedure, a plaintiff is not required to sue both the principal and agent, but may sue them separately, or jointly. *Cox, supra; Nippa, supra.* In *Cox*, the Supreme Court held that a hospital's vicarious liability arises because the hospital is held to have done what its agents have done. *Id. at 15*. Further, when the hospital

is the only named defendant the issue remains whether the hospital's agents violated the standard of care applicable to them. *Id. at 14-15*. The fact that the statute of limitations may have expired against the agent does not change the analysis.

Furthermore, our Sixth Circuit Court of Appeals opined in *Southeastern Greyhound Lines et. al. v. McCafferty, 169 F.2d 1 (1948)*:

> As a matter of procedure appellee was not required to sue both Southeastern and Master. He could have sued them separately; or jointly, as he did here. If he prosecuted his action against Masters as an individual he would be required to show by the weight of the evidence that Masters' negligence was the proximate cause of the accident. If he prosecuted his action jointly he would be required to establish by the weight of the evidence that Masters, as the agent and employee of Southeastern, was negligent and the law would attribute his negligence as an employee to Southeastern. He was not required to obtain a verdict and judgment of liability against Masters individually as a prerequisite to recovery against Southeastern. *Id. at 3.*

Thus, Appellee could have brought the underlying cause of action and could recover from the Appellants under a vicarious liability theory without first filing suit and getting a judgment against the agent, Setti S. Rengachary, M.D.

At common law, when a plaintiff's complaint alleges that a hospital is liable for the acts of one of its agent doctors and thus seeks relief on the basis of vicarious liability, there is no question that if the plaintiff releases a doctor who is an agent of a hospital, the hospital cannot be found responsible as the release discharges the principal. *Theophelis v. Lansing Genral Hospital, 430 Mich 473, 424 NW2d 478 (1988)*; *Stamplis v. St. John Health System et. al., 2004 Mich App LEXIS 1367*. In the underlying cause of action, Appellee's complaint alleges that Appellants, University Neurosurgical Associates, P.C., Detroit Medical Center, and Harper-Hutzel Hospital, are liable for the acts of Setti S. Rengachary, M.D., their agent. **The Appellee**

however, never released Appellant, Setti S. Rengachary, M.D., and therefore this rule of law is not applicable. In no way did Appellant, Setti S. Rengachary, M.D., or Appellants agree to a judgment in favor of either party on the basis of a settlement. *Larkin v. Otsego Memorial Hospital Association, 207 Mich App 391, 525 NW2d 475 (1994).*

There is no question that a dismissal based upon the statute of limitations is not based upon the merits of the claim. *Rogers v. Colonial Fed. Savings & Loan Association, 405 Mich 607, 619, 275 NW2d 499 (1979); Nordman v. Ealre Equipment Co., 352 Mich 342, 346, 89 NW2d 594 (1958); Ozark v. Kais, 184 Mich App 302, 457 NW2d 145 (1990).* Instead, such a dismissal is construed as being on a technical, procedural ground only. *Id. at 308; Vertigan v. S.A. Torello, Inc. et. al., 2003 Mich App LEXIS* 833. As stated above, in the standard of review section, a motion for summary disposition under MCR 2.116(C)(7), specifically does not test the merits of a claim!

If summary judgment is granted to an agent, **based upon the merits of the claim however**, the hospital cannot be found responsible under the concept of vicarious liability. *Lamb v. Oaklwood Hospital, 41 Mich App 287 (1972)* (emphasis added). A Judgment, to constitute a bar to any subsequent claim, must be rendered on the merits. *Tucker v. Rohrback, 13 Mich 73 (1864); Malesev v. Garavaglia, 12 Mich App 282, 162 NW2d 844 (1968).* Additionally, Michigan courts have long held that where a suit against an agent is unsuccessful, the plaintiff cannot maintain a suit against the agent's principal. *DePolo v. Greig, 338 Mich 703, 709; 62 NW2d 441 (1954), quoting Krolik v. Curry, 148 Mich 214, 221-222, 111 NW 761 (1907).*

In the underlying cause of action, the trial court did not review the merits of Appellee's case, but rather dismissed the case because it believed that it lacked proper jurisdiction over Appellants. Judgment upon a demurrer going to form of the action, defect of pleading or to

jurisdiction of the court will not preclude future litigation on the merits of the controversy in a court of competent jurisdiction upon proper pleadings. *Laude v. Cossins, 334 Mich 622, 55 NW2d 123 (1952)*. **Again, in no way did Appellee, Setti S. Rengachary, M.D., or Appellants agree to a judgment in favor of either party on the merits of the malpractice claim and therefore this rule of law is not applicable in the underlying cause of action.**

There are even cases in this state that hold that if a consent judgment were entered, even if merely upon a mediation award, this will be construed by the court as being a release, and the hospital/institution could not be found responsible. *Felsner v. McDonald Rent-A-Car, Inc., 193 Mich App 565, 484 NW2d 408 (1992)*. **That also did not happen in this case.** Absent these limited circumstances, the fact that an agent has not been sued or has been dismissed is irrelevant to the liability of the principal.

For example, if there is a covenant not to sue negotiated between the plaintiff and individual defendant physicians, the hospital is still liable based upon the acts of its physician agent, even though the physician agent is not a party to the lawsuit and has been dismissed with prejudice. *Theophelis, supra; Larkin v. Otsego Memorial Hospital Association, 207 Mich App 391, 525 NW2d 475 (1994)*. Moreover, as previously stated above, a hospital can be held liable under theories of vicarious liability even if the defendant physician (without a covenant not to sue) simply has never been sued. *Cox, supra; Nippa, supra*.

The law in this state is that **if a principal and agent are both sued and subsequently it is determined by the court that it did not have jurisdiction over the individual-agent, an order of summary disposition could be entered as to that individual-agent, but the principal remains liable for the improper acts done by the agent.**

Unlike what Defendants-Appellants suggest in their Application, as persuasive authority only, Appellee directed the Court of Appeals and also this Honorable Court to the Supreme Court of Kentucky's decision in *Cohen v. Alliant Enterprises, Inc., 60 S.W.3d 536 (2001)*. **(EXHIBIT 6)** This case addresses the exact same issue that was the Court of Appeals and is directly on point. In *Cohen*, the sole issue was whether a principal can be held vicariously liable for the negligence of its agent when the agent has escaped liability by virtue of the statute of limitations. The Supreme Court of Kentucky differentiated between a release/settlement with the agent doctor and a covenant not to sue. **This is the same distinction that exists in Michigan.** The Kentucky Court further opined that the fact that a plaintiff cannot recover from the agent does not negate the fact that liability may exist, and that it can be imputed to the principal. **It is the negligence of the servant that is imputed to the master, not the liability. The test as to the liability of the master is whether the servant was guilty of negligence.** *Id. at538; Horne v. Hall, Ky. App., 246 SW2d 441 (1951)*. **(EXHIBIT 7)**

C. A Grant Of Summary Disposition Is Premature If Granted Before Discovery On A Disputed Issue Is Complete

Appellants now argue to this Honorable court, although they clearly did not advocate consideration of this issue on appeal, as noted by the Court of Appeals, that dismissal pursuant to MCR 2.116(C)(10) was also appropriate because there was no genuine issue of material fact regarding claims against the Detroit Medical Center or Harper-Hutzel Hospital. In an attempt to support this inaccuracy, Appellants propose Dr. Rengachary was not an employee or agent of the Detroit Medical Center and Harper-Hutzel Hospital before, on or after the dates complained of in Plaintiff's complaint. In support of this conclusion, Appellants attached an affidavit of Mary Ann Krueger, a Risk Management Claim's Consultant for the Detroit Medical Center. Appellants then stated that in order to prevail on a vicarious liability claim against the Detroit

Medical Center and Harper-Hutzel Hospital, Appellant must prove that Setti S. Rengachary, M.D. was either an employee, actual agent or ostensible agent, citing *Hoffman v. JDM Associates, Inc., 213 Mich App 469, 540 NW2d 689 (1995); Howard v. Parks, 37 Mich App 496, 500-501; 195 NW2d 39 (1972); Grewe v. Mt. Clemens General Hosp. 404 Mich 240, 252-253; 273 NW2d 429 (1978)*.

As stated above, the law in this state when granting a motion under MCR 2.116(C)(10) tests whether there is factual support for a claim. The standard in granting such a motion is clearly provided in the above argument and does not need to be reiterated again.

While discovery has been very limited in the underlying cause of action, Setti S. Rengachary, M.D., testified under oath at the evidentiary hearing that was held regarding service of process. By his own admission, and in direct contradiction to the affidavit supplied by the Appellees, Dr. Rengacahry clearly states "I'm employed at Wayne State University Detroit Medical Center." **(EXHIBIT 8).** Not only is this a clear admission that he is an employee of the Detroit Medical Center, it at the very least creates a genuine issue of material fact on this disputed issue.

Furthermore, a grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Mackey v. Dep't of Corrections, 205 Mich App 330, 333; 517 NW2d 303 (1994)*. To successfully oppose a motion for summary disposition on the ground that discovery is incomplete, a party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence. *Michigan Nat'l Bank v. Metro Institutional Food Service, Inc. 198 Mich App 236, 241; 497 NW2d 225 (1993); Bellows v. Delaware McDonald's Corp., 206 Mich App 555, 561; 522 NW2d 707 (1994)*. Through Dr. Rengachary's own testimony, Appellee provided the lower courts with independent evidence that a dispute does

exist as to the issue of Dr. Rengachary's status as either an employee or agent of Detroit Medical Center and Harper-Hutzel Hospital.

D. Dr. Rengachary's Dismissal Pursuant To MCR 2.116(C)(7), Statute Of Limitations, With The Added Words "With Prejudice," Does Not Bar Plaintiff From Imputing Dr. Rengachary's Negligence On His Principals, Based On The Theory Of Vicarious Liability

i. **Purpose of ruling on statute of limitations as a preliminary matter is to determine whether a trial on the merits will be necessary.**

Michigan courts continue to uphold the long standing principle that any motion premised upon (C)(7), will not test the merits of a claim but rather certain defenses that would make a trial on the merits unnecessary. *(emphasis added)*. *DMI Design and Manufacturing v. ADAC Plastics, Inc., 165 Mich App 205, 418 NW2d 386 (1987); Malesev vs. Garavaglia, 12 Mich App 282, 162 NW2d 844; Levy v. Corporate Health System, Inc. et. al., 1997 Mich App LEXIS 3395.*

This Honorable Court opined in *Malesev v. Garavaglia, 12 Mich App 282, 162 NW2d 844 (1968)*, that this **court rule allows a party to raise a certain defense which, upon a preliminary hearing, will determine if a trial on the merits is even necessary. If the defense is good, disposition of the claim may be made without a trial on the merits**. *Id. At 285*. This Honorable Court clearly and unequivocally held that a dismissal based upon the statute of limitations, as was the case with Dr. Rengachary's dismissal, is not a dismissal decided on the merits. *Id. At 285*.

Although an unpublished decision, our Sixth Circuit Court of Appeals, in *The Taylor Group, supra*, interpreting Michigan law, went so far to say that a prior decision on the basis of the statute of limitations is not a decision on the merits, citing *Bd. Of County Rd. Comm'rs, supra*. *Id. At 9*. In fact, the Circuit Court unequivocally stated that a judgment based upon the statute of limitations has no preclusive effect because it is not decided on the merits. *Id. At 9-10*.

ii. A procedural issue does not test the merits of a claim

Michigan law has long held that the statute of limitations is regarded as procedural, not substantive. *People v. Russo, 439 Mich 584, 595, 487 NW2d 698 (1992); Lothian v. Detroit, 414 Mich 160, 166, 324 NW2d 9 (1982); Covell v. Splengler, 141 Mich App 76, 82, 366 NW2d 76 (1985); Herrick v. Taylor, 113 Mich App 370, 374, 317 NW2d 631 (1982); Forest v. Parmalee, 402 Mich 348, 262 NW2d 653 (1978).*

This Honorable Court opined in *McNeil v. Quines, 195 Mich App 199, 489 NW2d 180 (1992)*, that a dismissal based upon the statute of limitations is not an adjudication of the merits. *Id. At 3*. This Honorable Court went so far to say that "**when ruling on the legal issue of the statute of limitations, the trial court should not have considered the factual validity of plaintiff's claim or the convenience that a grant of summary disposition to defendant would afford the trial court.**" *Id. At 3*. As in the case here, the lower court, per its opinion at the evidentiary hearing, specifically did not base its decision on Dr. Rengachary's dismissal on the factual validity or merits of Appellant's claims, but solely on the issue of service, as to Dr. Rengachary only! **(EXHIBIT 4, pgs. 51, 98, 99)**

iii. The words "with prejudice" are irrelevant

Again, the words "with prejudice," have little or no bearing on whether a principal can be held responsible for the acts of its agent. *Larkin v. Otsego Memorial Hospital Association, 207 Mich App 391, 525 NW2d 475 (1994); Stamplis v. St. John Health System et. al., 2004 Mich App LEXIS 1367* **(EXHIBIT K in Appellant's Brief on Appeal);** *George v. 1078385 Ontario Limited, 2002 Mich App LEXIS 2028; Laude v. Cossins, 334 Mich 622, 55 NW2d 123 (1952).*

In *Laude, supra*, an action had been originally dismissed "with prejudice," because the court had lacked jurisdiction. The Michigan Supreme Court opined that even though the words

"with prejudice" were on the written order dismissing the first case, these words did not add anything to the conclusiveness of the judgment. *Id. At 6*.

In *George, supra*, the trial court dismissed an action based on the ground of forum non conveniens "with prejudice." *Id. At 2*. This Honorable Court held that it is inappropriate to order a dismissal "with prejudice," when the merits of the claim have not been adjudicated. *Id. At 8*.

In *Larkin, supra*, the physician doctor was released from the case "with prejudice." This Honorable Court, in its ruling, demonstrated that the words "with prejudice," in the doctor's dismissal order, had little or no bearing on whether the principal could still be held liable for the doctor's negligence. *Id. At 392-396*.

CONCLUSION

First, the Court of Appeals clearly showed a factual dispute exists, preventing the trial court from concluding, as a matter of law, Appellee's claims were time barred. Remember, there must have been undisputed facts as to when Plaintiff filed the complaint and when Plaintiff served Defendant. This is obviously not the case here! Furthermore, the Court of Appeals clearly showed, through its careful interpretation of Michigan law, that a disputed preliminary factual issue, which has a direct bearing on a (C)(7) Statute of Limitation motion, is a factual issue to be submitted to a jury, if and only if, a jury demand has been timely filed.

Second, Appellee provided the lower courts with evidence and law sufficient to establish, as a matter of law, that the test as to the liability of a principal is whether the agent is guilty of negligence; the fact that an agent is able to escape liability for his alleged negligence because the statute of limitations had run does not insulate the principal from vicarious liability for that negligence; that a plaintiff can bring a suit and recover from the principal under a vicarious

liability theory without first filing suit and garnering a judgment against the agent; and the trial court's grant of summary disposition under such circumstances constitutes reversible error.

Appellants have failed to support the trial court's erroneous rulings with any legal authority. The Appellants would like this Honorable Court to rule that once an agent is out, the principal is out, no matter what. This is not the law in the State of Michigan! The Court of Appeals was absolutely correct with its ruling on this issue.

RELIEF REQUESTED

WHEREFORE, based on the foregoing, Plaintiff-Appellee, Abdul Al-Shimmari, respectfully requests that this Honorable Court deny Defendants-Appellants' Application for Leave to Appeal in its entirety.

Respectfully submitted,

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